IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 697 OF 1997

Anib D'monte ..Appellant

versus

Mrs. Yasmeen Fakir Mohd.
Shaikh & Ors. ..Respondents

Mr. Clive D'souza for the Appellant.
Mr. M. C. Hedge with B. Mohiddin for the Respondent No.4.

CORAM : D. G. DESHPANDE,J.

DATE : 8TH APRIL,2005

ORAL ORDER :

1. Heard counsel for the Appellant and the Respondent No.4.

2. This appeal is filed by original defendant No.1 to challenge the judgment and decree of the City Civil Cour, Mumbai dated 30.4.1997, by which the suit of the plaintiff was decreed in terms of prayers (b), (c) and (d) and it was declared that the defendant no.1 - appellant was trespasser in the suit property and the plaintiff was entitled for vacant possession, further relief of injunction was

also granted to the plaintiff. Originally the suit was filed by Phyllis Felix. During the pendency of the suit he sold the suit property to present plaintiff in 1991. The suit was in respect of House No. 43B, Chapel Road, Bandra, Mumbai 400 050. The original defendant Nos. 2 to 4 were the heirs and legal representatives of one Victor Penha and during his lifetime Victor had disputed the title of the plaintiff and filed a suit in the City Civil Court, Mumbai, vide Suit No. 4349 of 1978 and in the Small Causes Court being Suit No. 975/77. However, the suit before the City Civil Court abated and since the appellant had no legal right, title or interest in the property and had no right since their possession become illegal after the demise of Mr. and Mrs. William Dyas and since they were forcibly occupying the other rooms and the suit came to be filed for possession and other reliefs. According to the plaintiff the defendant - appellant was neither the tenant nor licensor of any type and they were liable to be evicted.

3. The claim of the plaintiff was resisted by the defendant - appellant. The defendant raised different contentions regarding the room which was in their occupation or in occupation through their predecessor but mainly the contention of the defendant was they were protected from eviction

under the provisions of Bombay Rent Act. The defendant also challenged the title of the plaintiff and Dr. Victor D'penha.

4. The court after considering all circumstances, documents and legal position passed the decree, as stated above, against which the present appeal is filed.

5. Counsel for the appellant made two submissions only. Firstly, according to him the appellant was the foster son. He was brought up from the age of 3 years in the suit premises and as such he was member of the family. D'monto was the father of the present appellant and according to the defendant D'monto's sister was the wife of the original tenant. The parents of the appellant died when he was young or orphan and he was brought by the original tenant and he lived with the original tenant from the age of 7 years.

6. Counsel for the appellant contended that as per the judgment of the Supreme Court reported in **AIR 1997 Supreme Court 628 K. V. Muthu vs. Angamuthu Ammal** the foster son need not be the real legitimate child of the person who brings him, as a member of the family. The question before the Supreme Court was directed against the judgment of

the Division Bench of Madras High Court which laid down that the foster son would under given set of facts be a member of the landlord's family. The Supreme Court after considering the defence and relevant case law ultimately held that foster son would certainly can be a member of the family. Counsel for the appellant therefore contended that since appellant was the foster son of the original tenant he was entitled for protection. In that regard he relied on three documents only, viz. a ration card standing in his name and two Wills, certified copies of which were tendered to me, during the course of the arguments, executed by foster mother and foster father, viz. Willam Days and Flordina Days. Both the wills are dated 11.11.1973. According to these Wills both the deceased testators i.e. foster father and foster mother have treated the appellant as their foster son and bequeathed their property to him, therefore these two documents coupled with the ration card were sufficient to hold that the appellant was foster son and was a member of the family of the original tenant and as such entitled for protection.

7. However, when questioned the counsel for the appellant had conceded that these two wills though exhibited and brought on record, were not proved according to law. Though the Wills are of 1973 no

probate proceedings or testamentary petition were initiated by the appellant and also no attesting witness of any of the aforesaid Wills was examined by the appellant. Victor Penha died in 1979 but no attempt was made by the present plaintiff to get the Will probated or file a suit for declaration on that basis. Therefore, Wills though are taken on record cannot be taken into consideration at all. Therefore the Wills do not support the case and contention of the appellant. He may be a foster son but as rightly observed by the Supreme Court in paragraph 31 of the aforesaid judgment :

> **"From the above, it would appear that is not in every case that a son who is not the real son of a person would be treated to be a member of family of that person but would depend upon the facts and circumstances of a particular case."**

Therefore, legally foster son may be entitled to certain rights but whether in a given case he gets such right or not would depend on the facts of the case. In this appeal the appellant has miserably failed to prove that he was regarded as foster son by the deceased William and his wife Mrs. Flroinda. Admittedly when two important documents in favour of the appellant are in his possession, not obtaining

probate of letters of administration and not doing any attempts to assert his right, create doubt about the veracity and validity of the Wills. But, these findings may not be taken as a final conclusion on this issue of Wills. So far as this case is concerned, Wills do not support the case of the appellant at all.

8. So far as ration card is concerned, the counsel for the respondent contended that the ration card was obtained when the age of the appellant was 21 years. But there is no other further evidence to show that from the age of 7 years till 21 years that the appellant was living with William and Florinda. In the circumstances, it has to be held that the appellant therefore failed to prove his right in the property and the trial court was justified awarding the decree.

9. Counsel for the appellant made only the above submissions i.e. with reference to the appellant being the foster son and relied upon two Wills and the ration card and nothing more, before me. He however pointed out certain admissions given by the plaintiff in his evidence. It is by witness No.2 Fakir Mohamad Mohamedkasaim Shaikh, he has stated :

> **"I do not know personally whether William Days was occupying suit premises for years together prior to 1979. He was staying as a tenant."**

Admittedly, the plaintiff is a subsequent purchaser and he was not bound to know the capacity or right in which William was staying.

10. As against this, counsel for the respondent drew my attention to admission given by D.W. 1 wherein he has stated :

> **"I had sent a letter of 22nd September 1974 or 1975 to Phelis D Penha complaining about her harassment to me by calling me a trespasser but I did not institute any declaratory suit."**

Now D.W. 1 is the appellant himself. It is therefore clear that since in 1974 - 1975 itself the appellant was being treated or regarded as a trespasser but till this date or at least till the date of the judgment of the lower court or at atleast for a considerable long time, the appellant did not file any declaratory suit for his protection or assertion of his right, Therefore, firstly, the so-called admission given by the P.W 2 is of no

consequence and it does not destroy the case of the plaintiff. To the contrary the appellant miserably failed to prove his rights in the property. The court has given well reasoned judgment, has taken into consideration all the legal aspects of the matter and therefore no interference is called for.

11. In the result, I pass the following order:

ORDER

. Appeal is dismissed with costs all throughout.

. Appellant will hand over possession of the suit premises within three weeks from today, without fail

. Certified copy of two wills both dated 11.11.1973 be returned to the appellant after retaining zerox copy of the same.

8.04.2005 (D.G.DESHPANDE, J.)